Supreme Court of the United States

October Term, 1937.

No. 10

OCEAN BEACH HEIGHTS, INC., NORMANDY BEACH DEVELOPMENT COMPANY, ET AL.,

Petitioners,

Versus

THE BROWN CRUMMER INVESTMENT COMPANY, TOWN OF NORTH MIAMI, ET AL.,

Respondents.

PETITION OF THE BROWN CRUMMER INVESTMENT CO. FOR A REHEARING.

GILES J. PATT

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———:———

PETITION FOR REHEARING.

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Comes now the above-named Respondents, The Brown Crummer Investment Company, and presents this, its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

I.

The opinion of this Court clearly indicates an intention to decide this case in accordance with what it conceived to be the local law of Florida in force at the time

the bonds were issued in 1926 and 1927 and the law of Florida as it has been interpreted in Mahood v. State ex rel Davis, 101 Fla. 1254, 133 So. 90, and Leatherman v. Alta Cliff, 114 Fla. 305, 153 So. 845, decided since the bonds were issued. These later decisions are in direct conflict with the earlier decision of the Florida Court in Town of Enterprise v. State, 29 Fla. 128, 10 So. 740, and are not consistent with it as this Court assumed. Because:

A. In Enterprise v. State 29 Fla. 128, 10 So. 740, the Florida Supreme Court held that,

> "an attempt to incorporate two distinct detached tracts of land, as corporate territory under one government, *is unauthorized and void,*"

and that,

> "there was *no municipal government in existence* or operation."

If, as this Court now holds, the two tracts of land separated by the bay were "detached tracts" within the meaning of the statute, Enterprise v. State would have necessitated the further conclusion that the attempted incorporation was "unauthorized and void" and "no municipal government came into existence or operation." Since the rendition of the opinion in this cause, the District Judge for the Southern District of Florida has so held with reference to this particular town as shown by its opinion and order in United States of America, ex rel F. M. Horigan v. Town of North Miami, hereto attached and made a part of this petition and marked "Appendix". An appeal from that judgment has been taken to the Circuit Court of Appeals for the Fifth Circuit.

B. But, in Mahood et al v. State ex rel Davis, supra, and in Leatherman v. Alta Cliff, supra, long after the bondholders' rights had attached, the Court excluded one of two detached tracts (assuming they were "detached") without holding the entire municipality void. This ruling was

an innovation upon the law of Florida. For, as held in Enterprise v. State, incorporation under such circumstances was void, the municipality never came into existence and both tracts were similarly affected.

C. But all Courts are precluded from holding as against petitioner that the corporation of Miami Shores did not legally exist; by the validation decree, which, by statute is made "forever conclusive . . . . against the city and all taxpayers and citizens thereof; and the validity of said bonds shall never be called into question in any court in this state", Compiled General Laws of Florida, 1927, Sections 5106 through 5109; and by the judgment obtained in the Federal Court by the plaintiffs (respondents) (R-283) based upon the declaration (R-286) which alleged that

> "said town of Miami Shores is now and was at the time hereinafter mentioned a municipal corporation acting under and by virtue of the laws of the State of Florida".

This judgment under Sauls v. Freeman 24 Fla. 209, 4 So. 525, is conclusive against all taxpayers and citizens as to the existence of the town. Both judgments are conclusive in this cause of the legal existence of the corporation as a whole at the time the bonds were issued. The fact that the Supreme Court of Florida has ordered the exclusion of one of the tracts since the bonds were issued should not affect the rights of petitioner which was not party to these causes. Both tracts should have been excluded, if the Enterprise case controls, or neither tract, if the validation decree and plaintiffs' judgment obtained in the Federal District Court are given their legal effect.

D. The opinion of the Court also fails to take into consideration the fact that the legal existence of the town has been repeatedly recognized by the Legislature of Florida, which both before and after bonds were issued, enacted statutes relating thereto; Chapter 13103 of the Acts of 1927

changing the name, Chapter 14237 of the Acts of 1929 validating the sale of one issue of bonds (some of which are included in the judgment), Chapter 15347 and Chapter 15822 of the Acts of 1931 authorizing the town to compromise delinquent taxes and assessments and Chapter 15688 which abolished the town subject to the results of a referendum vote. Two of these statutes were enacted before quo warranto proceedings were instituted. Under numerous decisions of this Court, this constituted legislative recognition.. Even the Supreme Court of Florida in Mahood v. State, supra, recognized the power of the Legislature to validate the organization of the town when it said that it "was not prepared to say that the Legislature could not by proper enactment create a municipality embracing an area a part on one side and a part on the other side of a bay of this character." None of these legislative acts made any distinction between the east side tract and the west side tract, but impliedly recognized the validity of the corporation as a whole which would have been void under Enterprise v. State, supra.

E. The opinion of this Court assumes that the two tracts of land separated by the bay "were detached tracts within the meaning of the statute." But, in so doing it apparently overlooked Section 2943, Compiled General Laws of 1927 which gave towns organized under the statute authority "over the waters of all rivers, creeks, harbors or bays contained within the corporate limits." This Section has been *a part and parcel* of the general municipal self incorporation statute of Florida since it was added thereto by Chapter 1855 of the Acts of 1871. The Florida Court had never dealt with this section prior to the issuance of the bonds of respondent. The case of Enterprise v. State, supra, dealt with two tracts of land separated by five miles of intervening land. All textbook writers and the supreme courts of other states which had construed similar statutes of self incorporation had affirmatively held that the existence of an intervening navigable river

or bay did not prohibit a city or town organized under a self incorporation act from either including or annexing territory across the water of said river or bay. See general statement to this effect in 19 R. C. L. Paragraph 40, p. 734 McQuillan Municipal Corporations, 2nd Ed. Section 294, and the cases cited, including Blanchard v. Bissell, 11 Ohio State Reports 96; Ford v. North Des Moines, 80 Iowa 626, 45 N. W. 1031; Vogel v. Little Rock 59 Ark. 335, 15 S. W. 836; Vestal v. Little Rock 54 Ark. 321, 15 S. W. 891; and Houghton County v. Blacker, 92 Mich. 638, 52 N. W. 951. Such unanimous construction of similar statutes, with the statement of the Supreme Court of Florida in Lane v. State, 63 Fla. 220, 57 So. 662, *decided in* 1912 after the decision in Enterprise v. State and before the bonds were issued, that under Section 8, Article 8 of the Constitution,

> "it is within the power of the Legislature by valid enactments to prescribe the territorial limits of a municipality as it deems proper when no provision or principal of organic law is violated. Even if the description of the territory in the special act establishing the town of Auburndale, when properly construed, would cover noncontiguous lands, the Constitution is not thereby violated."

justified this petitioner as purchaser of the town's bonds, especially after the decree of validation, in assuming that the tracts were "contiguous" and not "detached".

II

The holding of this Court that the east side lands could not be brought within the taxing power of the town

> "by the owners' acquiescence in its attempted exertion of jurisdiction over them * * *. The consent of owners of lands located beyond permissible limits of the municipality cannot be made to serve as a statutory grant of power."

insofar as to make lands liable for taxes necessary to be levied for the payment of debts is contrary to the decision of the Supreme Court of Florida in State v. Lake Placid, 121 Fla. 839, 164 So. 531, where the Court in referring to the special act which fixed the boundaries of Lake Placid said:

> "The act was a legislative act; not the act of people living within a village, hamlet, or town, who, under the general law, sections 2935, 2936, 2937, 2938 et seq., Comp. Gen. Laws of 1927, desired to establish for themselves a municipal government. See Town of Enterprise v. State, 29 Fla. 128, 10 So. 740; Leatherman v. Alta Cliff Co., 114 Fla. 305, 153 So. 845. See, also, State v. Town of Forest Park, 87 Fla. 477, 100 So. 735.
>
> "If such had been the case, the averments in the answer may have presented a question of estoppel against the corelators who complain of the inclusion of their lands within the territorial boundaries of the town."

This statement recognizes that though estoppel does not serve as a grant of power, it can preclude property owners from escaping liability for the payment of taxes levied for debts in towns organized under the *general law of incorporation.*

III

The opinion of this Court on the authority of Duke v. Taylor, 37 Fla. 64, 19 So. 172, holds there can be no municipality de facto in the absence of a law authorizing the creation of a municipality de jure. Petitioners admit that there was a law authorizing *self incorporation of municipalities* which law has been repeatedly recognized by the Supreme Court of Florida as a valid one. Duke v. Taylor relates only to the organization of *private* corporations. The law of Florida relating to the creation of

de facto public or municipal corporations is stated in West v. Lake Placid, 97 Fla. 127, 120 So. 361,

> "Where an attempted incorporation of a municipality is an absolute nullity, such incorporation may be collaterally attacked. In this instance, however, acting under at least color of authority from the Legislature found in the passage of Chapter 12990, supra, this municipality apparently in good faith has taken the necessary steps to put its charter into operation, has elected its officers, has assumed the duties of local government under its charter, and has otherwise engaged in an active user of the franchise — all of which has been acquiesced in by the inhabitants of the municipality until the institution of this proceeding. Thus the municipality has become at least a municipality de facto."

The statute incorporating that town was held to be void under the Florida Constitution in State v. Lake Placid 117 Fla. 874, 158 So. 497; and 121 Fla. 839, 164 So. 531. But Henderson v. Lake Placid (decided January 8, 1938) recognized the validity of the taxes levied by that town for debt service despite the fact that there was no legal statute authorizing incorporation of the town.

IV

The opinion of this Court distinguishing the decision in Clapp v. Otoe County, 104 Fed. 473, apparently overlooked the fact that the invalidity of the precinct organization which issued the bonds there involved, was, as is the assumed invalidity of the town in this case, due merely to the fact that the boundary lines were fixed in a manner not authorized by the statute. The Court of Appeals in the Clapp case held that the precinct was a de facto corporation and that all property within the void boundaries was liable for taxes to pay the debts although the statute did not authorize the creation of a de jure precinct with such boundaries. The decision in that case is therefore a direct precedent for our position.

V

A dismissal of the bill of complaint by the District Judge as ordered by the opinion will not dispose of the conflict between the injunction of the State Court and the order contained in the peremptory writ of mandamus issued by the United States District Court commanding the levy of taxes against both tracts for the payment of plaintiff's judgment. But will leave the plaintiff and the city officials in the position which they occupied prior to the filing of the bill.

V I

This case is of vital importance to all municipalities of Florida and to the holders of their bonds. The condition of municipal credit in Florida is deplorable. While the Court apparently intended to limit the effect of its decision to towns organized under the general law of self incorporation, the statement in the opinion that purchasers of bonds could by inspection of the statute and the boundaries, have ascertained that the territory included was in excess of statutory limitations, will necessarily effect creditors of every municipality in Florida. Because the Supreme Court of Florida has in other decisions, such as State v. Stuart, 97 Fla. 69, 120 So. 335; State ex rel Davis v. Largo, 110 Fla. 21, 149 So. 420; Town of Boynton v. State, 103 Fla. 1113, 138 So. 639; State v. City of Homestead, 100 Fla. 354, 130 So. 29, and others, held that in quo warranto proceedings it can exclude from municipalities whose boundaries are fixed by special legislative enactment, lands not benefited. The opinions of the Supreme Court of Florida are replete with instances where property has been excluded from municipalities whose boundaries were fixed by special legislative act because they were not benefited, and where it can be said with equal force that purchasers of bonds should have determined such fact by a mere "inspection of the statute and the boundaries."

VII

The Court in attempting to differentiate this case from "those dealing with good faith attempts to organize municipalities under unconstitutional enactments presumed valid until adjudged repugnant to fundamental law" apparently overlooked the fact disclosed in this record that this was a good faith attempt by the taxpayers and inhabitants of both sides of the bay to organize a municipality under a statute presumed sufficient to authorize the inclusion of lands and navigable waters lying between and not adjudged insufficient until after the bonds were issued. Constitutionality of a statute which would authorize such is admitted by the Supreme Court of Florida in Mahood v. State, supra, and Lane v. State, supra, where in the latter case it was said:

> "Even if the description of the territory in the special act establishing the town of Auburndale, when properly construed, would cover noncontiguous lands, the Constitution is not thereby violated."

VIII

At the time the bonds owned by the Brown Crummer Investment Company were purchased from the town there was not only nothing in the statutes of Florida or the decisions of that state to indicate that any lands were improperly included within the boundaries of the town, but, the statute itself impliedly recognized the power and the decisions of other states confirmed such assumption. The decision of the Supreme Court of Florida in Lane v. State impliedly affirmed it, and the actions and conduct of the taxpayers and inhabitants of both tracts of land all conduced to cause said Company to believe that there was no legal defect in the organization of the town or ground upon which the major portion of the property subject to taxation could escape liability therefrom.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the decree of the Supreme Court be, upon further consideration, reversed.

Respectfully submitted,

GILES J. PATTERSON,

Solicitor for Respondents.

CERTIFICATE OF COUNSEL

I, Giles J. Patterson, counsel for the above-named Respondents, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

GILES J. PATTERSON,

Solicitor for Respondents.

APPENDIX

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA,

MIAMI DIVISION No. 2380-M-Civ.

UNITED STATES OF AMERICA, ex rel., F. M. HORIGAN, a citizen and resident of the State of Wisconsin,

Relator,

v.

WALTER S. HEYWARD, as Mayor, E. C. HARNER, GEORGE S. BULLARD, M. V. EDLIN, J. C. FLANDERS, and H. V. FORTUNE, as and constituting the Town Council, and E. C. HARNER, as President of the Town Council, and E. MAY AVIL, as Treasurer and Town Clerk of NORTH MIAMI, a municipal corporation existing under the laws of the State of Florida, in Dade County, Florida,

Respondents.

ORDER

This cause coming on to be heard on the motion of relator for leave to amend the petition for alternative writ

of mandamus and the alternative writ of mandamus herein and there being no objections thereto,

It is ordered that said motion be and the same is hereby granted and said alternative writ of mandamus is hereby amended instanter by inserting therein the words and figures "January 5, 1938" in lieu and instead of "January 5, 1937"; and said petition for alternative writ of mandamus and said writ are hereby amended instanter by substituting the names of J. V. Shellhorse and Frank Dale as respondents in the place of George S. Bullard and M. V. Edlin.

And the cause coming on to be heard on the motion of respondents to quash said alternative writ of mandamus as amended and the same having been argued by counsel for the respective parties and the court being duly advised in the premises and it appearing that the Supreme Court of the United States did, on the 18th day of January, 1938, hand down its opinion in that certain case of Ocean Beach Heights, Inc., Normandy Beach Development Company, et al., petitioners v. The Brown Crummer Investment Company, Town of North Miami, et al., on writ of certiorari to the United States Court of Appeals for the Fifth Circuit, which was a case appealed from this court and which involved records and principles of law pertaining to the case now before this court; and it appearing that the Supreme Court of the United States stated that the Florida statutes which:

> "empower the male inhabitants of any hamlet, village or town 'to establish for themselves a municipal government,' . . . require notice specifying time and place of meeting and the proposed corporate limits, sec. 2937, . . . direct that 'the qualified electors present, being not less than two-thirds of those whom it is proposed to incorporate and not less than twenty-five in number, shall select a corporate name . . . for the municipality . . . and designate BY DEFINITE METES AND BOUNDS THE TERRITORIAL LIMITS' sec. 2938";

and in construing this and other related statutes, the court cited the case of the Town of Enterprise v. State, 29 Fla. 128, 10 So. 740, and stated that:

> "the state supreme court held that the statute did not permit incorporation of disconnected tracts of land, found a part of the territory proposed to be incorporated to be disconnected from the other part, and declared (p. 145): 'An attempt to incorporate two distinct detached tracts of land, as corporate territory under one government, is unauthorized and void' ";

and then the court stated that a:

> "mere inspection of the statute and the defined boundaries unmistakably shows . . . these were detached tracts within the meaning of the statute";

and then it stated:

> "the state supreme court of Florida having held that an attempted incorporation of detached areas was unauthorized and void and there existed no color of authority for the inclusion of the east side",
> (See Mahood et al. v. State ex rel. Davis, Attorney General, et al., 101 Fla. 1254, 133 So. 90, and Leatherman v. Alta Cliff Co., et al., 114 Fla. 305, 153 So. 845)

that is the land lying on the east side of the bay which was a part of the original territory constituting the alleged Town of North Miami; and it appearing that the Supreme Court of the United States, upon these findings of law and fact, held that:

> "In the absence of a law authorizing creation of a new municipality de jure there can be none defacto".

So, based upon these decisions and the records therein, the Court is of the opinion and so holds, that the attempt to incorporate the two distinct detached tracts of land as corporate territory under one government to be called the Town of North Miami was unauthorized and void.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the motion to quash the alternative writ of mandamus be and the same is hereby granted and the petition for the alternative writ be and the same is hereby dismissed.

DONE and ORDERED at Miami, Florida, this the 29th day of January, 1938.

(s) A. V. LONG,
U. S. Judge.

SUPREME COURT OF THE UNITED STATES.

No. 10.—October Term, 1937.

Ocean Beach Heights, Inc., Normandy Beach Development Company, et al., Petitioners,
vs.
The Brown-Crummer Investment Company, Town of North Miami, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 17, 1938.]

Mr. Justice Butler delivered the opinion of the Court.

The question is whether for the payment of its outstanding bonds the respondent town may tax petitioners' lands which, without statutory authority, were included by boundaries defined in proceedings for its incorporation. Petitioners' contention is that the lands never were within the boundaries of the towns *de jure* or *de facto* and that therefore they are not subject to its taxing power.

The Florida statutes empower the male inhabitants of any hamlet, village or town "to establish for themselves a municipal government," (Compiled General Laws, 1927, § 2935) to be designated an incorporated town if it contains less than 300 registered voters, § 2936. They require notice specifying time and place of meeting and the proposed corporate limits, § 2937, and direct that "the qualified electors present, being not less than two-thirds of those whom it is proposed to incorporate and not less than twenty-five in number, shall select a corporate name . . . for the municipality . . . and designate by definite metes and bounds the territorial limits," § 2938.

In 1892, in *Town of Enterprise* v. *State*, 29 Fla. 128, the state supreme court held that the statute did not permit incorporation of disconnected tracts of land, found a part of the territory proposed to be incorporated to be disconnected from the other part, and declared (p. 145): "An attempt to incorporate two distinct detached tracts of land, as corporate territory under one government, is unauthorized and void. . . ."

In 1926, electors residing in Dade County, Florida, on the west side of Biscayne Bay, incorporated a town, Miami Shores now called North Miami. The boundaries specified by the incorporators included approximately 16 square miles, 14 of which were on the west side of the bay and had a population of 2500. Two square miles were on the east side and had but 12 inhabitants. Though nearly vacant, these lands were much more valuable than all the property on the west side. The water separating the two areas is about a half mile wide. At the time of incorporation, construction of a causeway had been commenced, but its beginnings having been destroyed by hurricane later in that year, it has not been built. By land the distance between the settlement on the west side and the east side area is about ten miles, and to go by land from one to the other it is necessary to pass through another municipality. Petitioners own lands on the east side.

Between January 1, 1927 and April 1, 1928, the town issued bonds, $238,000 of which are outstanding. In each bond the town pledged its faith and credit for payment and declared that provision had been made for the levy and collection, each year that the bond remained outstanding and unpaid, of sufficient taxes on all taxable property within its limits to pay principal and interest as they came due. But none of the bonds contained any statement indicating the boundaries of the town or in any manner representing that any part of the area on the east side of the bay was within its limits. The bonds were validated by decrees of the circuit court for Dade County, §§ 5106-5109, Compiled General Laws, 1927. No owner of east side land was party to the validation suits and no question as to whether the town included any part of the lands east of the bay was there involved. Proceeds of the bonds were used for the construction of permanent improvements; the only part spent on the east side was $6,000 for mosquito eradication, most of which went for equipment which the town still owns.

In a *quo warranto* suit brought by the State on the relation of its attorney general in August, 1929, and in a later suit brought by owners of east side lands to cancel tax certificates on their lands, the state supreme court held that the statute relied on for creation of the municipality did not authorize inclusion of non-contiguous areas. *Mahood* v. *State*, 101 Fla. 1254. *Leatherman* v. *Alta Clif Co.*, 114 Fla. 305. And in those suits it was finally adjudged that

the east side was not and never had been a part of the incorporated town, and that the town never acquired jurisdiction *de jure* or *de facto* over the land east of the bay. A decree of ouster as to the east side land was entered in December, 1931, and tax certificates on lands on that side were canceled. No bondholder was a party to either of these suits.

Prior to the *quo warranto* suit, the jurisdiction of the town over the east side was not challenged by the State, property owners or others. And until prevented by the decree of ouster, the town exerted municipal authority on both sides of the bay within the boundaries defined by west side electors acting to incorporate the town. It laid taxes on east side lands, some of which were paid by petitioners.

In 1930 respondent sued the town in the United States District Court for Southern Florida and got judgment on nine of the bonds. There was involved no question as to whether the east side lands ever were within the town or liable to be taxed to pay the bonds. In 1931 respondent brought in the same court a mandamus suit to compel the town and its officers to levy taxes on all the lands within the boundaries defined by the incorporators. Owners of land on the east side including petitioners were permitted to intervene. They maintained that the town had no jurisdiction over their lands or authority to tax them. The court entered a decree commanding the town and its officers to tax all the property within the town limits as originally defined. The town and its officers did not object to the decree nor appeal from it. The intervening east side owners attempted to have it reviewed in the Circuit Court of Appeals. The court held that, as the judgment was not against them, they had no standing to question it and dismissed their appeal. 69 F. (2d) 105.

Then respondent brought this suit for itself and other bondholders against the town, its officers, the clerk of the circuit court of Dade County, and east side land owners, including the petitioners. It alleged that the town was unable to pay the bonds unless permitted to levy and collect taxes on east side property; that the town and its officers were ready and willing so to do, but were prevented by the decrees in the *Mahood* and *Leatherman* cases, and that the clerk of the circuit court was bound by the decree in the latter case. It prayed an injunction to restrain petitioners from

interfering, by use of the ouster decree or otherwise, with the levy or collection of taxes on east side lands for the payment of respondent's judgment and the outstanding bonds and to restrain the town and the clerk of the court from refusing to levy or to take steps required for collection of such taxes. The town and its officers answered and in effect joined in the prayer of the bill. Petitioners moved to dismiss, the court denied their motion; two of them answered. The parties introduced their evidence, the court found the facts and entered its decree substantially as prayed. Petitioners alone appealed. The Circuit Court of Appeals affirmed on the ground that the town *de facto* included the east side lands. 87 F. (2d) 978.

That view cannot be sustained. This case differs essentially from those dealing with good faith attempts to organize municipalities under unconstitutional enactments presumed valid until adjudged repugnant to fundamental law. See, e. g., *Clapp* v. *Otoe County*, 104 Fed. 473, 482. *Speer* v. *Board of County Com'rs*, 88 Fed. 749, 765. *Ashley* v. *Board of Supervisors*, 60 Fed. 55, 64. *City of Winter Haven* v. *Gillespie*, 84 F. (2d) 285, 287. *State* v. *City of Cedar Keys*, 122 Fla. 454, 462, 463. In the absence of a law authorizing the creation of a municipality *de jure* there can be none *de facto*. McQuillan, Municipal Corporations (2nd Ed.), § 175. *City of Guthrie* v. *Wylie*, 6 Okla. 61, 66. *Norton* v. *Shelby County*, 118 U. S. 425, 444. *Shapleigh* v. *San Angelo*, 167 U. S. 646, 655-656. *Tulare Irrigation District* v. *Shepard*, 185 U. S. 1, 13. *United States* v. *Royer*, 268 U. S. 394, 397. *Evenson* v. *Ellingson*, 67 Wis. 634, 646. *Duke* v. *Taylor*, 37 Fla. 64, 77. The town *de jure* could not be made to include the east side. *Mahood* v. *State, supra*. *Leatherman* v. *Alta Cliff Co., supra*. Mere inspection of the statute and the defined boundaries unmistakably shows that the west side electors were without authority to incorporate the east side tract with that in which they resided. Unquestionably, these were detached tracts within the meaning of the statute. The state supreme court having held that attempted incorporation of detached areas was unauthorized and void (*Town of Enterprise* v. *State, supra*) there existed no color of authority for the inclusion of the east side. The east side lands could not be brought within the taxing power of the town by the owners' acquiescence in its attempted exertion of jurisdiction over them and payment of taxes thereon that it in form laid

prior to the ouster decree. The town *de facto* could not derive from the consent of the east side owners jurisdiction that it *de jure* was without capacity to receive. The consent of owners of land located beyond permissible limits of the municipality cannot be made to serve as would a statutory grant of power. *Hayes* v. *Holly Springs,* 114 U. S. 120, 126-127. *Merrill* v. *Monticello,* 138 U. S. 673, 693-694. As the east side lands never became liable to be taxed by the town to pay its bonds, respondents were not entitled to restrain petitioners from defending against levy and collection of the taxes or to any relief in this suit. The decree of the Circuit Court of Appeals will be reversed and the case will be remanded to the district court with directions to dismiss the bill.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.